(2) Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE: THIS IS AN UNPUBLISHED OPINION

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, WARDEN
Respondent-Appellee.

Argued: November 6, 1998

Decided and Filed: May 26, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and upon review of the petition by the original hearing panel, the panel grants the petition to rehear, vacates and sets

aside the original decision and issues a new decision as follows:

David Paris appeals the district court's dismissal of his habeas corpus petition in which he challenges his 1991 conviction for felonious assault by contending that he received ineffective assistance of counsel on direct appeal. The District court dismissed the petition on grounds of procedural default, finding that Paris failed to file his ineffective assistance claim within the ninety-day deadline set forth by Ohio App. R. 26(B). For the reasons that follow, we REVERSE the judgment of the District Court.

On June 21, 1991 Paris was convicted of assaulting Darius Walker, a young boy. Paris appealed his conviction to the Ohio Court of Appeals and, because he was indigent, received appointed counsel. Paris's appointed counsel, Stephen Schutte, filed a brief which contained a short five-paragraph argument that failed to address what Paris contends was his meritorious ground for appeal: the trial court's admission of the out-of-court statements of a four-year-old declarant without conducting a voir dire hearing to determine competence. Keisha Walker, the four-year-old sister of Darius, made the out-of court statements in question at approximately 11:37 a.m. on September 17, 1990. This was thirteen hours after the alleged assault of Darius Walker. During these thirteen hours, Keisha had slept, awoken, and spent several hours with her babysitter. Keisha's out-of-court statements were admitted pursuant to the excited utterance exception to the hearsay rule. In order for the excited utterance exception to apply, it must be established that the exciting influence had not lost its sway over the faculties of the declarant before the making of the statement. After thirteen hours we think that the startling event of the assault of her brother had lost its dominion over Keisha's reflective

faculties. *See, Potter v. Baker*, 162 Ohio St. 488, 496 (1955). In addition, Keisha's statement was not an unreflective one as it is required to be to qualify as an excited utterance under Ohio law. *Id.* at 495-96. Keisha had not said anything about the incident until questioned by two paramedics who arrived at her home. The United States Supreme Court has recognized that children are susceptible to suggestion during questioning and that unless the circumstances of a child's questioning carry sufficient particularized guarantees of trustworthiness to establish the absence of suggestion, the Confrontation Clause bars admitting children's hearsay answers into evidence. *Idaho v. Wright*, 497 U.S. 805, 813 (1990). After answering the paramedics questions, Keisha was taken to the hospital where she was interrogated by three individuals who recounted her answers at trial. Keisha's statements to these individuals were admitted pursuant to the excited utterance exception. We find that the paramedics prior questioning of Keisha tainted any exciting influence that might have stilled Keisha's reflective capacity and thus the admission of these statements was error. Under these facts, we conclude that in his appellate brief, Schutte failed to raise obvious errors of the trial court.

On March 26, 1992, the Ohio Court of Appeals denied Paris's appeal. Four months passed before Schutte informed Paris that his appeal was denied. Upon learning of the outcome of his appeal, Paris contacted the Ohio Public Defender for legal assistance. The Public Defender placed Paris on a waiting list for three years because of the large caseload and limited personnel of the Public Defender's office.

In August 1995, the Public Defender finally filed a motion in the Ohio Court of Appeals to reopen Paris's case.

The Ohio Court of Appeals denied the motion on October 23, 1995, based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment and conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

The court held that Paris failed to show "good cause" for filing his motion three years after the Ohio Court of Appeals decision. The Court of Appeals' decision was affirmed by the Ohio Supreme Court. *State v. Paris*, 76 Ohio St.3d 270, 667 N.E.2d 390 (1996).

On October 21, 1996, Paris filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. Paris's petition was dismissed without reaching the merits because the district court found that Paris had procedurally defaulted by not abiding by the time limitations set forth in Ohio App. Rule 26(B) and was unable to show cause and prejudice for the default. Paris made a timely appeal to this court.

This court examines four factors when deciding whether a petitioner's state procedural default precludes consideration of the merits of a habeas corpus petition: (1) whether the state has a procedural rule that is applicable to the petitioner and with which the petitioner has failed to comply; (2) whether the state courts actually enforce the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground that forecloses review

of a federal constitutional claim; and (4) whether the petitioner can show cause for failing to follow the rule and that he was prejudiced as a result. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986). In order for a state rule to serve as a procedural default, the court must answer the first three inquiries in the affirmative and the fourth in the negative.

Paris asserts that he can establish cause and prejudice for his failure to follow Ohio App. R. 26(B). He first points to his attorney's failure to inform him of the result of his appeal of right for four months. It is true that Paris's attorney so failed to inform him. This explains 120 days of the more than three year delay. Moreover, Paris's attorney also failed to communicate to his client how to proceed with further appeals. The United States Supreme Court has held that ineffective assistance of counsel constitutes cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). We have no difficulty in finding that Schutte provided ineffective assistance of appellate counsel as defined under *Strickland v. Washington*, 466 U.S. 668 (1984).

After learning of the outcome of this appeal, Paris contacted the Ohio Public Defender for legal assistance. Because of the large caseload of the Public Defender, Paris was placed on a three year waiting list. The District Court concluded that Paris's claim was barred because he failed to appeal the decision of the Ohio Court of Appeals for three years after his attorney informed him of the Court of Appeals decision. We cannot agree with the District Court. First, Paris's appellate attorney on his appeal of right gave him no guidance on how to further appeal and failed to develop the legal issues that would most likely allow Paris to succeed on appeal. Because of this, we do not think that it can fairly be said that Paris truly had his first appeal as of right. Second, it

would be unjust to blame a layman such as Paris for the backload at the Ohio Public Defender's Office. They did not inform him that he was in danger of procedural default and as a layman it would not be evident to him that his claim might procedurally expire while in the hands of the Public Defender. To hold otherwise would be to allow the incompetency of Paris's appellate counsel and the backlog at the Ohio Public Defender's office to eviscerate Paris's right to a meaningful first appeal. Hence, we find that the cause for Paris's delay is the incompetence of his appellate counsel and the backlog at the Ohio Public Defenders office.

Paris is likewise able to show prejudice. The Ohio trial court wrongly interpreted the law of hearsay in Ohio and violated the Confrontation Clause of the United States Constitution, thus admitting testimony in violation of Paris's rights under state and federal law.

Accordingly, the case is remanded to the District Court with instructions to issue the writ of habeas corpus, giving the state a reasonable time to retry the petitioner.

FARRIS, J., Circuit Judge, dissenting.

Paris has demonstrated neither cause for his procedural default nor prejudice therefrom. Thus, I dissent.

I. Cause

The majority holds that the incompetence of Paris's appellate counsel and the backlog at the Ohio Public Defender's office constitute cause for his delay. Both grounds are untenable.

The Supreme Court has held that ineffective assistance of counsel cannot constitute cause if it occurs at a stage where the petitioner is not constitutionally entitled to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991). After Paris's direct appeal was denied, he had no right to counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Therefore, the fact that after this point (1) Paris's attorney failed to communicate with him, and (2) the Public Defender was too busy to press his post-conviction claim for more than three years, cannot satisfy the legal definition of cause. Under these circumstances, Paris cannot claim that a bad lawyer is worse than no lawyer at all.

The majority not only ignores the relevant Supreme Court case law, it sets a dangerous precedent. The vast majority of Paris's lengthy delay in filing his Rule 26(B) petition is attributable to the backlog at the Public Defender, not the deficiency of his counsel on direct appeal. If Paris had hired private counsel for the post-conviction proceedings, the majority surely would not accept "backlog" as an excuse for delay. Nor would it allow a pro se petitioner to sit on his claim for so long. The result should be no different where the Public Defender's office serves as counsel. *See State v. White*, 72 Ohio St.3d 91 (1995). These attorneys are no less capable of adhering to procedural rules than the rest of the bar.

Finally, a prior panel of this Court has refused to find cause in nearly identical circumstances. *See Riggins v. Turner*, 110 F .3d 64, 1997 WL 144214 at *2 (6th Cir.1997) (unpublished). In *Riggins*, the petitioner was convicted of rape, and his appeal was denied. Eight years later, he filed a Rule 26(B) petition, which was denied as untimely. On habeas review, he claimed that his counsel on direct appeal was ineffective for, among other things, failing to argue that his trial counsel was ineffective for not objecting to the admission of certain evidence. He argued that appellate counsel's ineffectiveness was cause for his failure to file a timely Rule 26(B) petition. Citing *Coleman, supra*, the panel rejected this argument. Although not binding, *see United States v. Skinner*, 25 F.3d 1314, 1318 (1994), this recent decision is strong persuasive authority.

II. Prejudice

Even more disturbing is the majority's conclusion that Paris was prejudiced by the Ohio courts' refusal to grant his Rule 26(B) petition. After a cursory analysis of Ohio hearsay law, the majority holds that Keisha Walker's statements do not fall under the excited utterance exception to the hearsay rule, and therefore they should have been excluded. A wealth of Ohio case law belies the majority's assertion.

First, the Supreme Court of Ohio has recognized that trial courts have "a wide discretion ... to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." *State v. Duncan*, 53 Ohio St.2d 215, 219 (1978). If the trial court's resolution of this factual question is reasonable, an appellate court should not disturb it. *State v. Wallace*, 37 Ohio St.3d 87, 90 (1988).

Ohio courts have also recognized a "clear judicial trend to liberalize the requirements for an excited utterance when applied to young children victimized by sexual assaults." *State v. Wagner*, 30 Ohio App.3d 261, 263 (1986). This trend is based partly on the recognition that "children are likely to remain in a state of nervous excitement longer than would an adult." *State v. Taylor*, 66 Ohio St.3d 295, 304 (1993). It also arises from "the recognition of [a child's] limited reflective powers. Inability to fully reflect makes it likely that the statements are trustworthy." *Id.*

Although the statements of a child witness, not a victim, are at issue here, the rationale behind the trend still applies. Keisha Walker was undoubtedly traumatized by the sight of her stepfather savagely beating her younger brother. Paramedics testified that the boy ended up with bruises over 90% of his body, including his eyes, ears, and scrotum. The trial court could have reasonably concluded that Keisha remained in a "state of nervous excitement" thirteen hours after witnessing this terrible abuse. *See id.* It also could have reasonably concluded that the four-year-old Keisha had "limited reflective powers." *See id, see also State v. Wagner*, 30 Ohio App.3d 261, 264 (1986) ("As a three-year-old, truly in the age of innocence, [the victim] lacked the motive or reflective capacities to prevaricate the circumstances of the attack") Under these circumstances, Keisha's statements are inherently trustworthy.

The majority improperly relies on the thirteen hour gap between the beating and Keisha's initial statements. In the child abuse context, Ohio courts have applied the excited utterance exception to statements that were made long after the related incident. *See, e.g., Wallace*, 37 Ohio St.3d at 90 (statements admitted despite gap of fifteen hours); *Wagner*, 30 Ohio App.3d at 261-62 (initial statements admitted

despite gap of roughly twelve hours, second set of statements admitted despite gap of six days); *State v. Johnson*, 1992 WL 205119 at *6 (Ohio App. 8 Dist.) (unpublished) (statements admitted despite 24 hour gap).

Likewise, the fact that Keisha did not mention the abuse until questioned by the paramedics is not dispositive. Ohio courts have upheld the admission of elicited statements as excited utterances. *See, e.g., Wagner*, 30 Ohio App.3d at 263-64; *Wallace*, 37 Ohio App.3d at 91-92; *Johnson*, 1992 WL 205119 at * 7. Moreover, *Idaho v. Wright*, 497 U.S. 805, 813 (1990), relied upon by the majority, is inapplicable. The state need not show that hearsay statements "carry sufficient particularized guarantees of trustworthiness" if they "fall [ ] within a firmly rooted hearsay exception" *Id.* at 816. Excited utterances are just such an exception.

The majority incorrectly concludes that the paramedics' initial questioning of Keisha "tainted any exciting influence", and therefore her later statements to the hospital workers are inadmissible. Ohio courts have upheld the admission of subsequent statements as excited utterances. *See, e.g., Wagner*, 30 Ohio App.3d at 167 (upholding admission of statements made to police detective five days after initial statement to mother); *Johnson*, 1992 WL 205119 at *6 (upholding admission of statements made to detective one day after prior questioning by same detective).

In holding that Keisha's statements are inadmissible, the majority improperly substitutes its judgment for that of the trial court. It also ignores Ohio's clear trend toward admitting such statements. The trial court's resolution of this evidentiary issue was not unreasonable, and therefore it should be upheld on appeal. Even if it was unreasonable, however, the record contains other evidence of Paris's guilt.

As his lawyer acknowledged on direct appeal, Paris admitted at trial that he struck Darius Walker. This fact alone undermines Paris's claim of prejudice.

Finally, the majority overreaches in instructing the state to afford Paris a new trial. Both Paris's petition and the majority opinion are premised on the assertion that he was denied a meaningful first appeal. Given these circumstances, a more appropriate remedy would be to require the state to allow an out-of-time post-conviction appeal. [FN1] *See Byrd v. Smith*, 407 F.2d 363, 366 (5th Cir.1969). This approach would allow the Ohio courts to decide issues of Ohio evidentiary law. Moreover, it would provide Paris exactly what he sought in his Rule 26 petitions. The majority's usurpation of the available state processes ignores principles of federalism and comity.

FN1. If the state fails to provide this opportunity within a reasonable time, a new trial or unconditional release would be appropriate. *See id.*

I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, Warden.
Respondent-Appellee.

Filed: August 19, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Farris would grant rehearing for reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE: THIS IS AN UNPUBLISHED OPINION

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, Warden
Respondent-Appellee.

Argued: November 6, 1998
Decided and Filed: March 3, 1999
Vacated: May 26, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

R. GUY COLE, JR., Circuit Judge. David Paris appeals the district court's dismissal of his habeas corpus petition filed pursuant to 28 U.S.C. 2254, in which he

challenges his 1991 conviction for felonious assault based on his contention that he received ineffective assistance of counsel on direct appeal. The district court dismissed the petition on the grounds of procedural default, finding that Paris failed to file his ineffective assistance claim within the ninety-day deadline set forth by Ohio App. R. 26(B). For the reasons that follow, we AFFIRM the judgment of the district court.

I.

On September 17, Darius Walker, a young boy, was found by paramedics at his babysitter's apartment with bruises over his body, having been struck with a belt, flashlight and fists. Walker was taken to the hospital and treated for his injuries. Law enforcement arrested David Paris, Walker's stepfather, and charged him with felonious assault in violation of O.R.C. 2903.11 and child endangerment in violation of O.R.C. 2919.22. Paris was convicted on June 21, 1991 of felonious assault and sentenced to prison for a term of eight to fifteen years.

Paris appealed his conviction to the Ohio Court of Appeals and, because he was indigent, received appointed counsel. However, Paris's appointed counsel, Stephen Schutte, filed a brief which contained a short five-paragraph argument[1] that failed to address what Paris contends were his

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[1] The entire substantive part of the brief states the following:

Assignment of Error

The Court erred in charging the jury with an instruction for felonious assault when the facts indicated an offense of simple assault.

meritorious grounds for appeal: the district court's admission of out-of-court statements of a four-year-old declarant without conducting a voir dire hearing to determine competence and other out-of-court statements that fell outside the hearsay exception. On March 26, 1992, the Ohio Court of Appeals denied Paris's appeal.

Schutte neglected to inform Paris of the outcome of his direct appeal until four months had passed. Upon finally learning of the outcome, Paris contacted the Ohio Public Defender for legal assistance. However, because of the Public Defender's large caseload and limited personnel, Paris was placed on a waiting list for three years. During this time, Paris did not appeal the Ohio Court of Appeal's decision to the Ohio Supreme Court, nor did he file an ineffective assistance of counsel claim.

Argument of Error

As noted in the Statement of Facts, the Court charged the jury with both felonious assault and the lesser included offense of assault. It is Appellant's contention that the charge should have been one for the lesser included offense of assault.

The distinction between R.C. 2903.11 and 2903.13 is crucial herein. R.C. 2903.11 states "(A) No person shall knowingly: (1) cause serious physical harm to another." R.C. 2903.13 states (sic) (A) No person shall knowingly cause . . . physical harm to another."

The writer can find no distinction in Ohio law that distinguishes between "physical harm" and "serious physical harm". (sic). The subject is treated at 87 ALR 2d 926.

In August 1995, the Public Defender finally filed a motion in the Ohio Court of Appeals to reopen Paris's case alleging ineffective assistance of counsel. The Ohio Court of Appeals denied the motion on October 23, 1995, based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

(emphasis added). The court held that Paris failed to show "good cause" for waiting to file his motion three years after the Ohio Court of Appeals decision. Paris appealed the Ohio Court of Appeals' decision to the Ohio Supreme Court, which affirmed the decision of the lower court. *See State v. Paris*, 76 Ohio St. 3d 270, 667 N.E.2d 390 (1996).

On October 21, 1996, Paris filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio.[2] The case was referred to a magistrate judge, who issued a report and recommendation stating that Paris's petition should be dismissed without reaching the merits because he had procedurally defaulted by not abiding by the time limitations set forth in Ohio App. Rule 26(B) and was unable to show cause and prejudice for

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[2] Because Paris filed his petition after April 24, 1996, his petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

the default. Paris objected, but the district court adopted the magistrate judge's initial and supplemental report and recommendation and dismissed the petition based on procedural default. Paris filed a timely notice of appeal.

II

Paris appeals the district court's dismissal of his habeas corpus petition on the basis of procedural default. When considering a district court's dismissal of a habeas petition, we review the district court's legal findings de novo, and its factual findings for clear error. *See Cardinal v. United States*, 954 F.2d 359, 362 (6th Cir.1992).

This court examines four factors when deciding whether a petitioner's state procedural default precludes consideration of the merits of a habeas corpus petition: first, whether the state has a procedural rule that is applicable to the petitioner and with which the petitioner has failed to comply; second, whether the state courts actually enforce the state procedural rule; third, whether the state procedural rule is an adequate and independent state ground that forecloses review of a federal constitutional claim; and fourth, whether the petitioner can show cause for failing to follow the rule and that he was prejudiced as a result. See *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). In order for a state rule to serve as a procedural default, the court must answer the first three inquiries in the affirmative, and the fourth in the negative.

Paris concedes the first two factors of the *Maupin* test,[3] but bases his argument on the third and fourth factors.

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[3] At oral argument, Paris argued for the first time that Rule 26(B) was not firmly established and regularly followed at the time of

He contends that courts have applied the "good cause" requirement of Rule 26(B) inconsistently and, therefore, it is not an adequate state procedural bar, citing to instances in which courts have allowed delays well after the ninety-day deadline. *See State v. Nitenson*, 1994 Ohio App. LEXIS 827, No. 91 CA 796, 1994 WL 69894 (Ohio App. 4 Dist., Feb 24, 1994) (one year delay); *State v. Wright*, 1994 Ohio App. LEXIS 3374, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (ten month delay). He also argues that Rule 26(B) does not provide any clear guidelines for determining when a petitioner can file his petition beyond the ninety-day filing period, citing for support *Morales v.*

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his June 21, 1991 conviction because it was not codified until July 1, 1993. If we were to consider this late argument, we would find that it has no merit. While Paris is correct that prior to July 1, 1993, Rule 26 did not contain a distinct provision for ineffective assistance of counsel claims, it did set forth a ten-day time limit for the "application for reconsideration of any cause or motion submitted on appeal." Following the Ohio Supreme Court's recommendation that the legislature adopt an amendment to better serve defendants who allege ineffective assistance of counsel, *see State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), Rule 26(B) was enacted to provide a ninety-day limit for ineffective assistance of counsel claims.

Regardless of the time limitations set forth in Rule 26, Paris waited three years after learning of his defeat on direct appeal before filing his ineffective assistance of counsel claim in the Ohio Court of Appeals. This delay cannot be attributed to Schutte, and Paris offers no other explanation. Moreover, the Ohio Courts have applied the ninety-day requirement of Rule 26(B) to convictions older than Paris's. *See State v. White*, 1991 Ohio App. LEXIS 357, 1991 WL 8581 (Ohio App. 8 Dist., Jan. 31, 1991), *aff'd*, 72 Ohio St. 3d 91, 647 N.E.2d 787 (1995); *State v. Klein* 1991 Ohio App. LEXIS 1346, 1991 WL 41746 (Ohio App. 8 Dist., Mar. 28, 1991), *aff'd*, 69 Ohio St. 3d 1481, 634 N.E.2d 1027 (1994).

Calderon, 85 F.3d 1387, 1393 (9th Cir.) (striking down a California statute for habeas corpus timeliness requirements in part for vagueness), cert. denied, 519 U.S. 1001, 117 S. Ct. 500, 136 L. Ed. 2d 391 (1996).

We are unpersuaded by this argument because it misrepresents the purpose and meaning of Rule 26(B)'s "good cause" provision. By virtue of including this provision, the state legislature intended that courts have the discretion to consider ineffective assistance of counsel claims after the ninety-day deadline, provided there is good cause. The fact that some courts have considered a claim after the ninety-day deadline is consistent with, not contradictory to, the rule. Although "good cause" is subject to interpretation by the courts, the language of Rule 26(B) is precise: a defendant must file his application within ninety days or show good cause for the delay. Unlike the California rule at issue in Morales, the Ohio rule sets forth a petitioner's obligation to file a claim within the ninety-day deadline and the burden he must satisfy if he fails to meet that deadline.

Paris also contends that even if Rule 26(B) is an adequate and independent state ground and thus constitutes a procedural bar, he can establish cause and prejudice, the fourth prong of the test. *See Maupin*, 785 F.2d at 138. Paris argues that Schutte's failure to communicate to Paris that he had lost on direct appeal had the effect of "significantly damaging his chances for an application for reopening from the outset." *See, e.g., Boyd v. Cowan*, 494 F.2d 338, 339 (6th Cir. 1974) (stating that the attorney's duty to communicate with his client fully and promptly is particularly compelling when the client is incarcerated). In essence, Paris argues that Schutte is responsible for the entire three-year delay that transpired between his defeat on direct appeal and his filing

of ineffective assistance of counsel pursuant to Rule 26(B), when he was represented by the Ohio Public Defender.

We reject this argument. Although Paris had a constitutional right to effective assistance of counsel on direct appeal, *see Evitts v. Lucey*, 469 U.S. 387, 397, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985), he had no such right to counsel on discretionary matters such as a civil post-conviction action, *see Pennsylvania v. Finley*, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), even if the action involves alleged mistakes made on direct appeal. Attorney error cannot constitute cause when the error resulted in a petitioner's default in a proceeding in which he was not constitutionally entitled to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 751-53, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); *see also Riggins v. Turner*, 110 F.3d 64, 1997 WL 144214, at *2 (6th Cir. 1997) (unpublished).

The district court acknowledged that Schutte was responsible for the four-month delay informing Paris of the verdict on direct appeal and that Paris would have satisfied the "good cause" requirement if that were the only delay. We agree with the district court. It is of no consequence in this case, however, as we also agree with the district court that Schutte is not responsible for the additional three-year delay. Because Paris had no right to counsel on discretionary appeal, he bore the burden of complying with the procedural requirements of Rule 26(B). Paris sought and awaited discretionary counsel at his own peril.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

No. C-3-96-409

DAVID PARIS,
Petitioner

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: August 22, 1997

DECISION AND ENTRY ADOPTING INITIAL (DOC. #14) AND SUPPLEMENTAL (DOC. #18) REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE; PETITIONER'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #16 AND #19) OVERRULED; PETITION FOR WRIT OF HABEAS CORPUS DISMISSED AS PROCEDURALLY DEFAULTED; JUDGMENT TO ENTER IN FAVOR OF RESPONDENT AND AGAINST PETITIONER; CAPTIONED CAUSE RECOMMITTED TO UNITED STATES MAGISTRATE JUDGE FOR *IN FORMA PAUPERIS* AND CERTIFICATE OF APPEALABILITY ANALYSIS; TERMINATION ENTRY

Based upon the reasoning and citations of authority set forth by the United States Magistrate Judge in his initial (Doc. #14) and Supplemental (Doc. #18) Reports and Recommendations and the response by Respondent to Petitioner's Objections to the initial Report and Recommendations (Doc. #17), as well as upon a thorough *de novo* review of this Court's file and the applicable law, said Reports and Recommendations are adopted in their entirety. The Petitioner's Objections to said judicial filings (Doc. #16 and #19) are overruled.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Ohio R. App. P. 26(B)(1), requiring that a motion for reopening an appeal must be filed within 90 days of journalization of the judgment sought to be reopened, is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim, as that term is defined in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Indeed, the aforementioned rule of appellate procedure has been recognized as such by the Sixth Circuit Court of Appeals in an appeal of a case from this court. *Riggins v. Turner*, No. 95-4027 (6th Circuit Court of Appeals, March 27, 1997, unreported). The state's interest in finality of judgments warrants no other conclusion.

2. Of course, the 90 day procedural bar is applied in *seemingly* inconsistent fashion. Any procedural time limit, coupled with a good cause exception thereto, must, by definition, be dependent upon the unique set of facts and circumstances in that given case. It is, accordingly, hardly surprising that a delay of a given period of time (say, for example, 36 months) will prove to be, under one set of circumstances, cause to have delayed for that period of time,

while, under a different set of circumstances, will be found to bar the defendant's request to reopen his appeal.

3. In this case, cause has simply not been demonstrated by this Petitioner. It absolutely defies belief that the appellate court would have denied a Petitioner's motion to reopen his appeal, even though said motion were filed beyond the 90 day period of time, should Petitioner have made timely motion, as soon as he discovered that his initial appeal had been denied, and, moreover, was able to represent that he had not been alerted by his opposing counsel of said denial. If not being alerted by one's appellate counsel until more than 90 days after the appeal has been denied is not good cause for a Petitioner to fail to follow the procedural rule, then good cause can never been shown. The failure of Petitioner to show cause in this case was not the additional 30 day period between the expiration of the 90 days and his discovering that his appeal had been denied; rather, the failure to show cause is bottomed upon the almost three year delay *after* the Petitioner had acquired such knowledge. The Ohio Supreme Court, in *State of Ohio v. White*, 72 Ohio St. 3d 91, 647 N.E.2d 787 (1995), clearly set forth that a delay occasioned by the heavy workload of counsel does not constitute good cause for a delay in filing of a motion to reopen.

WHEREFORE, based upon the aforesaid, this Court, having adopted the initial (Doc. #14) and Supplemental (Doc. #18) Reports and Recommendations of the United States Magistrate Judge and having overruled the Petitioner's Objections thereto (Doc. #16 and #19), orders the Petition for Writ of Habeas Corpus dismissed as procedurally defaulted. Judgment will be entered in favor of the Respondent and against Petitioner herein.

The captioned cause is recommitted to the United States Magistrate Judge for a Report and Recommendations on whether the Petitioner should be allowed to appeal *in forma pauperis* and whether a Certificate of Appealability should be issued by this trial court.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

August 22, 1997

s/Walter Herbert Rice
WALTER HERBERT RICE,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

Copies to:

Angela Wilson Miller, Esq.
Lillian B. Earl, Esq.
Magistrate Judge Michael R. Merz

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-96-409

DAVID PARIS,
Petitioner

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: April 17, 1997

REPORT AND RECOMMENDATIONS

This is a habeas corpus case pursuant to 28 U.S.C. § 2254. Petitioner David Paris is represented by Assistant State Public Defender Angela Miller and raises one ground for relief: denial of effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution (petition, Doc. #1, at 5). Respondent has filed a Return of Writ (Doc. #8) and Petitioner has, with Court permission, filed a Traverse (Doc. #11).

STATE COURT PROCEEDINGS

Mr. Paris was indicted by the Clark County Grand Jury for one count of felonious assault (Return of Writ, Doc., #8, Ex. A). After trial and conviction by a jury, he was sentenced to 8 to 15 years imprisonment (Id., Ex. B). Represented on appeal by Springfield attorney Stephen Schutte, he filed one assignment of error: "The Court erred in charging the jury with an instruction for felonious assault when the facts indicated an offense of simple assault." (Id., Ex. C). The Court of Appeals found that the victim was a two-year old boy who had been beaten with a belt, a flashlight, and the Defendant's fists, evidence obviously sufficient to permit a conviction for felonious assault if the jury believed it (Id. at E).

The Court of Appeals affirmed the conviction March 26, 1992, but Mr. Parks [sic] did not learn that fact until July, 1992, when he wrote the State Public Defender for assistance. The sole method in Ohio for challenging ineffective assistance of appellate counsel is by motion to reopen the appeal under Ohio R. App. P. 26(B), and the State Public Defender filed such a motion on Mr. Paris's behalf in August, 1995 (Return of Writ, Doc. #8, Ex. F). The Court of Appeals denied the motion October 23, 1995 (Id., Ex. I). The Ohio Supreme Court "affirm[ed] the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E. 2d 787." *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E. 2d 390 (1996). Mr. Paris's Petition to this Court followed in October, 1996.

ANALYSIS

While a federal habeas petitioner is required to exhaust available state court remedies before filing his petition, Respondent concedes Mr. Paris has exhausted those remedies. However, Respondent asserts that merit consideration of Petitioner's claim is barred by his procedural default in presenting it to the Ohio courts.

A petitioner may not raise on federal habeas a federal constitutional right he could not raise on appeal in state court because of procedural default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Engle v. Isaac,* 456 U.S. 107 (1982). If, because of a procedural default, a habeas corpus petitioner can no longer present one or more of his claims to the state courts, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier,* 477 U.s. 478, 485 (1986); *Engle v. Isaac,* 456 U.S. 107, 129 (1982); *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia,* 372 U.S. 391, 82 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

The Sixth Circuit Court of appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Maupin v. Smith,* 785 F. 2d 135, 138 (1986).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.

(***)

> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*

Ohio plainly has a procedural rule which applies to making ineffective assistance of appellate counsel claims: they must be filed within ninety days of judgment in the court of appeals unless good cause is shown for filing later. Ohio R. App. P. 26(B). The Ohio Supreme Court has held that an attorney's heavy workload which prevents the filing does not constitute good cause under Rule 26(B). *State v. White*, 72 Ohio St. 3d 91, 647 N.E. 2d 787 (1995).

The second prong of *Maupin* requires that the procedural rule actually have been enforced against the petitioner. In this case the Court of Appeals expressly found that the claimed cause for delay – petitioner's counsel's heavy work load – was not good cause, relying on *White*.

(Court of Appeals Opinion, attached as Ex. I to Return of Writ, Doc. #8). The Ohio Supreme Court affirmed, itself expressly citing *White*. *Paris*, 76 Ohio St. 3d at 270. Thus a state procedural default was plainly enforced in this case against Mr. Paris.

The Ohio timely filing rule is plainly independent of federal grounds and is the kind of state procedural rule regularly held to be adequate; the States have an important interest in timely adjudication of claims. *Daniels v. Allen*, 344 U.S. 443 73 S. Ct. 397, 97 L. Ed. 469 (1953).

The question then becomes whether Mr. Paris can show cause and prejudice which will excuse his procedural default.

At one level Mr. Paris seems to argue that his cause for not filing the motion to reopen on time is that his attorney, Mr. Schutte, never told him that his conviction had been affirmed. Since that was clearly part of Mr. Schutte's duty to Mr. Paris and the failure happened in a proceeding in which Mr. Paris was entitled to appointed counsel, it would constitute cause if it were the sole reason for delay. However, Mr. Paris's motion papers in both this Court and the Ohio Court of Appeals make it clear he learned his conviction had been affirmed about 120 days after it happened, or 30 days outside the 90-day safe harbor in Ohio App. R. 26(B). However, the delay from then (July, 1992) until he actually filed the Motion for Reopening (August, 1995) was entirely caused by the heavy work load of the State Public Defender. It is this three-year delay which both the Ohio Court of Appeals and the Ohio Supreme Court held against Mr. Paris, not the thirty days during which he had not learned of the affirmance.

Attorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which he was not constitutionally entitled to counsel, e.g., a discretionary appeal or state post-conviction proceeding. *Coleman v. Thompson,* 501 U.S. 722, 111 S. St. 2546, 115 L. Ed. 2d 640 (1991). Ineffective assistance of counsel on appeal cannot constitute cause for failure to file a timely application for reopening of the direct appeal under Ohio App. R. 26(B) since a person is not entitled to counsel for the reopening. *Riggins v. Turner*, Case No. 95-4027 (6th Cir. 1997).

In sum, Mr. Paris procedurally defaulted on his claims by delaying the filing of his Motion for Reopening more than three years. The Ohio courts enforced that default against him and he has been unable to demonstrate cause and prejudice. His Petition should be dismissed without reaching the merits.[1]

April 17, 1997

s/Michael R. Merz
Michael R. Merz,
UNITED STATES
MAGISTRATE JUDGE

[1] Were the Court to reach the merits, it would certainly find that Mr. Schutte's grossly deficient performance meets the first prong of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); I offer no opinion on whether Mr. Paris was prejudiced thereby.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

No. C-3-96-409

DAVID PARIS,
Petitioner,

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: June 4, 1997

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Petitioner's Objections (Doc. #16) to my Report and Recommendations (Doc. #14) recommending the Petition be denied because of the sole claim – ineffective assistance of appellate counsel – had been procedurally defaulted in the state court system. By General Order, the District Judges at Dayton have permitted me to reconsider matters *sua sponte* when objections are filed.

Petitioner raises two objections, but the second argues the merits of the ineffective assistance of counsel claim and is not discussed here because I continue to conclude this Court is barred from reaching the merits.

Petitioner's first objection has two parts: (1) that I erred in finding that the state appellate court's reason for not reopening Mr. Paris's appeal was an adequate and independent state ground for that court's decision and (2) that I erred in analyzing Mr. Paris's cause and prejudice analysis.

ADEQUATE AND INDEPENDENT STATE GROUND

The relevant chronology, with which Petitioner does not quarrel, is set out in the original Report:

> The Court of Appeals affirmed the conviction March 26, 1992, but Mr. Paris did not learn that fact until July, 1992, when he wrote the State Public Defender for assistance. The sole method in Ohio for challenging ineffective assistance of appellate counsel is by motion to reopen the appeal under Ohio R. App. P. 26(B), and the State Public Defender filed such a motion on Mr. Paris's behalf in August, 1995 (Return of Writ, Doc. #8, Ex. F). The Court of Appeals denied the motion October 23, 1995 (Id., Ex. I). The Ohio Supreme Court "affirm[ed] the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E. 2d 787." *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E. 2d 390 (1996). Mr. Paris's Petition to this Court followed in October, 1996.

(Report and Recommendations, Doc. #14, at 2.)

Having found these facts, the original Report then applied the four-part procedural default analysis of *Maupin v. Smith*, 785 F. 2d 135, 138 (6th Cir., 1986). Petitioner likewise does not quarrel with the first two steps in my analysis:

1) Ohio has a procedural rule, embodied in Ohio R. App. P. 26(B), that a claim of ineffective assistance of appellate counsel must be raised by a motion to reopen the appeal, filed not later than 90 days after judgment on appeal , unless good cause be shown.

2) Ohio enforced this rule against Mr. Paris, denying his motion to reopen because it had been filed about 3½ years after his conviction was final on appeal. His asserted good cause for delay – the very heavy workload and consequent backlog of the State Public Defender's Office – was found not to be good cause by the Second District Court of Appeals, which found itself bound by Ohio Supreme Court precedent directly in point, *State v. White*, 72 Ohio St. 3d 91 (1995).

The third stage of the *Maupin* analysis is to determine if the state procedural rule is adequate and independent: independence is a question of state law, but adequacy is a question of federal law. *Liegakos v. Cooke*, 106 F. ed. 1381, 1385 (7th Cir. 1997). Mr. Paris concedes the Ohio rule in question is independent, but denies its adequacy. In doing so he relies heavily on *Carpenter v. Mohr*, Case No. C-2-96-117 (S.D. Ohio 1997) (Kinneary, J.) (unpublished, copy attached to Doc. #16).

In *Carpenter*, Judge Kinneary found that the state rule limiting reopening to 90 days in the absence of good cause was not an adequate state ground because it was not "firmly established and regularly followed" by the state courts, citing *Ford v. Georgia*, 498 U.S. 411, 423 (1991), quoting *James v. Kentucky*, 466 U.S. 341 (1984).

As evidence that the rule in question is not firmly established and regularly followed, *Carpenter* cites three state appellate decisions: *State v. Owens*, 1996 WL 146097 (Ohio App. Dist. 7; March 29, 1996); *State v. Holland*, 1994 WL 142735 (Ohio App. Dist. 10; April 21, 1994): and *State v. Nitenson*, 1994 WL 69894 (Ohio App. Dist. 4; February 24, 1994).

Judge Kinneary cites *Owens* for the proposition that some Ohio appellate courts have a standard under which good cause will almost never be found. *Carpenter* at 11. However, the court in *Owens* actually said that the appellant had offered no reason at all for his eight-year delay in filing. Judge Kinneary cited *Holland* as an example of courts which avoid the good cause issue and proceed directly to the merits. *Carpenter* at 11. However in *Holland* the Court of Appeals for Franklin County actually decided that the motion to reopen was both untimely and without merit. Finally, Judge Kinneary cited *Nitenson* as demonstrating some courts will almost always find good cause. *Carpenter* at 11. The appellate court there found good cause based on the *pro se* status of the appellant.

With all due respect to Judge Kinneary, I believe *Carpenter* was decided incorrectly. The opinion focuses on three unreported appellate decisions which do not have

controlling precedental weight in Ohio case law.[1] In contrast, there are numerous published opinions of the Ohio Supreme Court upholding the 90-day limit with the good cause exception. The following cases had been decided as of the time of the Superseding Report and Recommendations in *Riggins v. Turner*, C-3-94-359:

> In *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E. 2d 784 (1995), the Supreme Court considered arguments similar to those made here by Mr. Riggins. Reddick's conviction was final May 7, 1987; his application to reopen was not filed until August 31, 1993. The court held that the new App. Rule 26 applied to him with its express requirement of a showing of good cause for late filing. But it also held that a good cause requirement had existed at least since *Murnahan* and arguably before.
>
> > We hold, therefore, that the good-cause requirement of App. R. 26(B) succeeds and incorporates the good-cause requirement of *Murnahan* and former App. R. 14(B). Accordingly, an applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact that App. R. 26(B) did not exist within ninety days following journalization of the appellate judgment, but must show

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[1] See Rule 2(G)(1) and (2), Ohio Supreme Court Rules of the Reporting of Opinions.

> good cause why he or she did not attempt to invoke the procedures available under former App. R. 26 and 14(B). Neither *Murnahan* nor App. R. 26(B) was intended as an open invitation for persons sentenced to long periods of incarceration to concoct new theories of ineffective assistance of appellate counsel in order to have a new round of appeals. Rather, both were intended to allow the belated presentation of colorable claims that defendants/appellants were prevented from presenting timely by particular circumstances. Lack of effort or imagination, and ignorance of the law, are not such circumstances and do not automatically establish good cause for failure to seek timely relief.

647 N.E. 2d at 786.

The Ohio Supreme Court has consistently followed *Reddick* in the cases that followed.

- In *State v. Franklin,* 72 Ohio St. 3d 372 (1995), the defendant waited for five years from affirmance of his conviction to file an application for reopening on ineffective assistance grounds. The court of appeals (*sic*) found no good cause of the delay. The Ohio Supreme Court affirmed, expressly

holding that ignorance of the law was not a sufficient justification for untimely filing.

- In *State v. Tucker*, 73 Ohio St. 3d 152 (1995), defendant waited four years to apply for reopening, the court of appeals found no good cause, and the Supreme Court affirmed.
- In *State v. Peeples*, 73 Ohio St. 3d 152 (1995), the court found no good cause for seven years delay before moving to reopen and reiterated that applications under both App.R. 26A) and (B) require a showing of good cause for delay, citing *Reddick*.
- In *State v. Houston*, 73 Ohio St. 3d 346 (1995), the court found no good cause for delay of a year in filing to reopen.
- In *State v. Cooey*, 73 Ohio St. 3d 411 (1995), the court found no good cause for delay when the application to reopen was filed almost seven years after affirmance of the conviction and over one year after amended App.R. 26(B) became effective.
- In *State v. Winstead*, 74 Ohio St. 3d 277 (1995), the conviction was affirmed on September 28, 1994, and the application for reopening was filed one day late (i.e. on the 91st day) because the chosen courier service had failed to make timely delivery. The Hamilton County Court of Appeals held that did not constitute good cause and the Supreme Court affirmed *per curiam*.
- In *State v. Charlton*, 74 Ohio St. 3d 231 (1996), the conviction was affirmed in 1992 and the application to reopen was not filed

until 1994. Both appellate courts found no good cause.

- In *State v. Harris*, 74 Ohio St. 3d 233 (1996), the defendant waited eleven years and was found not to have shown good cause.
- In *State v. Oden*, 74 Ohio St. 3d 234 (1996), the wait was five years and the result was the same.
- In *State v. Way*, 74 Ohio St. 3d 236 (1996), defendant waited five years and received the same ruling.
- In *State v. Witlicki*, 74 Ohio St. 3d 237 (1996), the appellant waited twelve years and was found not to have shown good cause for the delay.
- In *State v. Wickline*, 74 Ohio St. 3d 369 (1996), the defendant waited almost six years and was found not have shown good cause.
- In *State v. Bell*, 73 Ohio St. 3d 32 (1995), appellant failed to show good cause for a delay of three and one-half years.
- In *State v. Otis*, 73 Ohio St. 3d 39 (1995), a delay of two years was found unexcused.

(Id., February 29, 1996).[2] The recommended holding in *Riggins* that Ohio App. R. 26(B) constituted an adequate and independent state ground was adopted by this Court and has now been affirmed by the Sixth Circuit on appeal

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[2] Numerous additional Supreme Court decisions to the same effect have been reported since then.

(Information copy attached [now available at 1997 WL 144214])[3]

Judge Kinneary indicates in *Carpenter* that he has not been able to find one Ohio Supreme Court finding good cause in the face of an appellate court decision finding no good cause. Again, with all due respect to a senior judicial officer, I believe this proves Rule 26 is "firmly established" and is being "regularly followed." He cites to *State v. White*, 72 Ohio St. 3d 91, 647 N.E. 2d 787 (1995), in which Justice Wright dissented from the holding of the court that a severe backlog in the State Public Defender's Office did not constitute good cause. Of course the Court of Appeals relied in *White* in Mr. Paris's case and the Ohio Supreme Court affirmed on the basis of the appellate opinion. The Ohio law is the majority decision in *White*, not Justice Wright's dissent. Apparently before his retirement from the court, Justice Wright was persuaded by his colleagues, because he did not dissent from the holding in *State v. Williams*, 74 Ohio St. 3d 454, 659 N.E. 2d 1253 (1996), that a backlog in the public defender's office was not good cause for delay.

The interests of comity and federalism which underlie the adequate and independent state ground rule strongly support upholding App. R. 26(B) here. Unquestionably, the States have an interest in finality of criminal convictions. They are under no constitutional obligation at all to provide for collateral attack on convictions. When they do so, as

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[3] Carpenter has no stare decisis effect on our decision of this case because Riggins was decided before Carpenter. Indeed, Judge Kinneary, under state decisis theory, should have followed Riggins. The problem with unreported decisions is that Judge Kinneary had no more way of learning about Riggins than I did of learning about Carpenter when the initial Report was written.

Ohio has done with App. R. 26(B), they are free to set absolute bright-line limits on the process. See *Daniels v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953)(meritorious argument in a capital case rejected because filed one day late; bright-line rule upheld as adequate and independent). Here, Ohio has adopted a clear rule but allowed a good cause exception . The reason which might constitute good cause would understandably vary and get picked out, in the usual common law way, over a period of time. This is not unlike the process which the federal courts have used and are using to define, over a range of cases, "excusable neglect" as it occurs in Fed. R. Civ. P. 6 and other places. In other words, choosing a bright-line rule and allowing judges to consider exceptions was a perfectly reasonable way to structure state consideration of ineffective assistance of appellate counsel claims. To invalidate the rule as *Carpenter* does, is to require Ohio's Courts of Appeals to hear claims of ineffective assistance of counsel whenever they are made and regardless of the reasons for delay. I recommend this Court adhere to its decision in *Riggins* that App. R. 26(B) is an adequate and independent state procedural rule.

CAUSE AND PREJUDICE

In the second part of his first objection, Mr. Paris argues I misanalyzed his cause and prejudice claim (Objections, Doc. #16, at 6-8).

At the fourth stage of the *Maupin* analysis, habeas petitioner can excuse his state procedural default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87,

97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977). In my initial Report, I analyzed this matter as follows:

> At one level Mr. Paris seems to argue that his cause for not filing the motion to reopen on time is that his attorney, Mr. Schutte, never told him that his conviction had been affirmed. Since that was clearly part of Mr. Schutte's duty to Mr. Paris and the failure happened in a proceeding in which Mr. Paris was entitled to appointed counsel, it would constitute cause if it were the sole reason for delay. However, Mr. Paris's motion papers in both this Court and the Ohio Court of Appeals make it clear he learned his conviction had been affirmed about 120 days after it happened, or 30 days outside the 90-day safe harbor in Ohio App. R. 26(B). However, the delay from then (July, 1992) until he actually filed the Motion for Reopening (August, 1995) was entirely caused by the heavy work load of the State Public Defender. It is this three-year delay which both the Ohio Court of Appeals and the Ohio Supreme Court held against Mr. Paris, not the thirty days during which he had not learned of the affirmance.
>
> Attorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which he was not constitutionally entitled to counsel, e.g., a discretionary appeal or state post-conviction proceeding. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed. 2d 640

> (1991). Ineffective assistance of counsel on appeal cannot constitute cause for failure to file a timely application for reopening of the direct appeal under Ohio App. R. 26(B) since a person is not entitled to counsel for the reopening. *Riggins v. Turner*, Case No. 95-4027 (6th Cir. 1997).

(Report and Recommendations, Doc. #14 at 4-5). I do not believe any additional analysis is necessary.

CONCLUSION

For the foregoing reasons, I again recommend that the Petition be dismissed on the merits as procedurally defaulted.

June 3, 1997.

s/Michael R. Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

IN THE SUPREME COURT OF OHIO

No. 95-2425

THE STATE OF OHIO,
Appellee,

v.

DAVID PARIS,
Appellant.

Submitted: June 25, 1996
Decided: August 7, 1996

In June 1991, appellant, David Paris, was convicted of felonious assault and sentenced to prison. In March 1992, the court of appeals affirmed the conviction and sentence. *State v. Paris* (Mar. 26, 1992), Clark App. No. 2836, unreported, 1992 WL 63387.

It is undisputed that Paris filed an application in August 1995 with the court of appeals to reopen his appeal under App.R. 26(B), alleging ineffective assistance of appellate counsel. In October 1995, the court of appeals denied appellant's motion to reopen because Paris failed to file his application within ninety days of the journalization of the appellate judgment, as required by App.R. 26(B). Further, the court found that Paris "has failed to show good

cause for his delay in filing his application to reopen his appeal."

Appellant appeals the denial to this court.

APPEAL from the Court of Appeals for Clark County, No. 2836.

Stephen A. Schumaker, Clark County Prosecuting Attorney, and Douglas M. Rastatter, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, David Klaus and Angela Wilson Miller, Assistant Public Defenders, for appellant.

PER CURIAM.

We affirm the judgment of the court of appeals for the reasons stated in its decision. See *State v. White* (1995), 72 Ohio St.3d 91, 647 N.E.2d 787.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and STRATTON, JJ., concur.

APPENDIX H

IN THE COURT OF APPEALS FOR
CLARK COUNTY, OHIO

C.A. No.: 2836
T.C. No. 90-CR-303

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID PARIS,
Defendant-Appellant.

Filed: October 23, 1995

DECISION AND ENTRY

PER CURIAM:

David Paris has moved to reopen his appeal pursuant to App.R. 26(B). Paris alleges that the attorney who represented him during his direct appeal rendered ineffective assistance by failing to challenge the trial court's admission of certain out of court statements by a child declarant under the "excited utterance" exception to the rule against hearsay evidence.

David Paris was convicted of Felonious Assault following a jury trial in June 1991. Paris was sentenced to a term of eight to fifteen years imprisonment.

David Paris timely appealed to this court, arguing error in the jury instruction given by the trial court. We found no merit in the claimed error and affirmed Paris' conviction and sentence. *State v. Paris* (March 26, 1992), Clark App.No. 2836, unreported.

On August 22, 1995, three years after Paris' conviction was affirmed by this court, David Paris filed this application seeking to reopen his appeal.

David Paris did not file this application to reopen his appeal within ninety days after the journalization of this court's judgment, as App.R. 26(B) requires. Accordingly, this application must be denied as untimely unless Paris demonstrates good cause for the late filing. *State v. Reddick* (1995), 72 Ohio St.3d 88. *State v. Dever* (1995), 73 Ohio St.3d 722.

Paris has submitted affidavits from both himself and the Assistant State Public Defender who represents him. They state that prior appellate counsel failed to inform Paris of this court's decision affirming his conviction, that Paris discovered our decision on his appeal when he contacted this court in July 1992, and that Paris subsequently requested assistance from the State Public Defender's Office in July 1992. The affidavits further state that, due to the caseloads in the office of the Ohio Public Defender, Paris was placed on a waiting list and that almost three years passed before an attorney from that office was assigned in March 1995 to review Paris' case, and that during this three year period Paris

contacted the State Public Defender's Office over fifty times requesting legal assistance with his case.

The reasons on which Paris relies have been rejected by the Ohio Supreme Court as a basis from which the good cause showing required by App.R. 26(B) may be found. *State v. White* (1995), 72 Ohio St.3d 91. This court is bound to follow that statement of policy by the Supreme Court.

David Paris has failed to show good cause for his delay in filing his application to reopen his appeal. The application to reopen his appeal is denied.

SO ORDERED.

s/James A. Brogan
JAMES A. BROGAN,
PRESIDING JUDGE

s/Mike Fain
MIKE FAIN, JUDGE

s/Thomas J. Grady
THOMAS J. GRADY, JUDGE